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SUPREME COURT, U.S.

No. 548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

HARRY RENTON BRIDGES, HENRY SCHMIDT and J. R. ROBERTSON,

Petitioners,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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I

With respect to the question whether this prosecution is barred by the statute of limitations, the Government's memorandum (pp. 20-23) agrees that the decision below is in square conflict with *United States* v. *Obermeier*, 186 F. 2d 243 (2nd Cir.) and *Marzani* v. *United States*, 168 F. 2d 133 (D. C. Cir.), affirmed by an equally divided Court, 335 U. S. 895, and similarly reaffirmed, 336 U. S. 922. Recognizing this conflict, the Government's memorandum substantially concedes, and certainly does not contest (pp. 35-36), the issuance of a writ of certiorari to review this question.

The Government's statement (p. 22) that the conflict "relates to a matter of diminishing importance" is supported only by the suggestion that there are less (by some indeterminate amount) than the "over one hundred prosecutions", relied on by the Government in its pending petition for certiorari in No. 527, *United States* v. *Klinger,* 199 F. 2d 645 (2nd Cir.), that would be governed by the decision in the instant case.

Furthermore, the Government's memorandum in the instant case (pp. 23-26) challenges the holding of the court below that Counts 2 and 3 of the indictment were not preserved by a saving clause in the 1948 repealer of the previous five-year statute of limitations—a challenge which implicitly invites review by this Court.

Finally, we respectfully remind the Court that a Federal District Court *within the Ninth Circuit (United States* v. *Grainger,* decided December 5, 1952) has deliberately declined to follow the decision in the instant case by the Court of Appeals for the Ninth Circuit, and that the Government is seeking an appeal to this Court in the *Grainger* case.* We cannot believe that the Government would thinkingly contend that the *Grainger* case, wherein the Government did not prevail, should be reviewed on appeal by this Court, but that the instant case, wherein the same basic question was decided below adversely to petitioners, should not be reviewed by this Court on certiorari. Certainly such a forked position would lend itself readily to invidious inferences.

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*See the petition in No. 548 at pp. 18-19, and the Government's memorandum at p. 22, footnote 14.

II

It seems apparent, therefore, that a writ of certiorari should issue to review the question respecting the statute of limitations. Obviously, the principal purpose of the Government's memorandum is to limit the scope of the writ to this question, as the Government's memorandum (p. 36) expressly requests.

With all the earnestness at our command, we respectfully urge that such a limitation in the writ is unsupportable. The question whether this prosecution was barred by prior adjudications is one of the two basic questions in this case, fully equal in importance to the question with respect to the statute of limitations, as is apparent from the content of and emphasis given to this point in our petition (pp. 7-14).

Apart from the judicial effect of the naturalization decree itself, and the emasculation of Constitutional guaranties resulting from multiple and repetitious penal proceedings (both of which are substantial questions), it is clear that the issue as between the Government and petitioners revolves around the judicial effect of this Court's decision in *Bridges* v. *Wixon*, 326 U. S. 135. The nub of this issue is clearly reflected in the following extract from the Government's memorandum (pp. 14-15):

> ". . . At most, what was decided in the prior proceedings was that Bridges had not been shown to be a member of the Communist Party before 1940. The issue as of 1945 when Bridges swore that he was not a member, was, of course, not at all involved in those proceedings. Thus the Government did not attempt to re-litigate any issue actually decided in the deportation hearings."

"To establish the falsity of the 1945 statement the Government did not rely on the evidence which had been introduced at the prior deportation hearings. All of the government's witnesses were new."

The flaw in the Government's argument is apparent from the extraordinary footnote. That the Government's witnesses against Bridges in the prior deportation hearings had all been discredited, so that the Government felt obliged to dredge up and rely upon an entirely new lot, is indeed interesting, but quite irrelevant to the point at issue. The question is not whether the prosecution's evidence came from new witnesses, but whether the issue which went to the jury was, in whole or in part, the same issue that had been litigated before. If, "what was decided in the prior proceedings was that Bridges had not been shown to be a member of the Communist Party before 1940", then obviously "the issue as of 1945", which alone should have gone to the jury, was whether Bridges was at any time a Communist after the decision in 1940 and before September 17, 1945 (the latest date specified in the indictment).

However, as we pointed out in our petition (p. 12, footnote 14), the indictment was not so limited, and the efforts of the defense to limit the evidence were unsuccessful. The Government's memorandum completely fails to meet this basic point. It is only necessary to read the Government's summary of its own evidence (pp. 4-10) to see that the great bulk relates to years prior to 1940. How the jury would have found had the issue been properly limited is, at best, entirely speculative.

We pass over without further comment the Government's labored efforts to explain away (p. 14) the conflict among the circuits created by the decision below with respect to the judicial effect of administrative or habeas corpus decisions. As for the Government's contention (p. 13) that *Bridges* v. *Wixon, supra,* merely held that the administrative hearing was "unfair", rather than that the evidence did not sustain the deportation order, we respectfully refer the Court to its

opinion in *Bridges* v. *Wixon*, at p. 156 ("Since it was error to admit O'Neil's unsworn statements against Bridges, since they were so crucial to the findings of membership, and since that issue was so close, we are unable to say that the order of deportation may be sustained without them".), and to the conclusion of the court below (Tr. 8386) that this Court in *Bridges* v. *Wixon* held "that the administrative decision approving an Executive Order to deport Bridges could not be sustained since it was not supported by substantial evidence."

It is difficult, therefore, to find any reasonable basis for restricting the scope of the writ in the manner suggested by the Government. It seems clear that the case should in any event come before this Court to review the limitations question. Why should petitioners be foreclosed from presenting the important legal issues, vital to petitioners' rights as citizens under a government of law, which stem from the prior adjudications? The integrity and effect of this Court's own decision in *Bridges* v. *Wixon* are directly involved in this proceeding and there are, therefore, especially compelling reasons for this Court itself to pass upon these issues.

III

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should not be limited in the manner suggested by the Government.

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February, 1953.